OCBC Bank (M) Bhd v Thaivanai a/p K Doraisamy

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-634 OF 1999
KAMALANATHAN RATNAM J
11 JANUARY 2000

Civil Procedure *— Injunction — Interlocutory mandatory injunction — Whether there is a tenancy — Injunction requiring defendant to deliver vacant possession — Injunction would in effect be giving final judgment — No strong evidence to support plaintiff's case — Whether injunction should be granted*

The plaintiff is and has been at all material times the registered owner of lands situated at Jalan Tun Perak, Kuala Lumpur, and held under Geran No 38426 ('the land'). The plaintiff alleged that a representative of one 'Hot Parking' approached the plaintiff some time before August 1999 seeking permission to use the land as a car park. The request was made by way of a letter dated 14 August 1999. However the plaintiff had no intention to lease the land to be used as a car park. On 21 August 1999, the plaintiff received a letter from the solicitors of 'Hot Parking' referring to an agreement between 'Hot Parking' and the plaintiff and notifying the plaintiff that if there was any interference from the plaintiff preventing the use of the land by 'Hot Parking', the latter would proceed with court action. Together with the letter the solicitors annexed a letter dated 16 August 1999 alleged to be from the plaintiff to 'Hot Parking', agreeing to lease the land for a period of seven years at RM6,000 per month commencing from 18 August 1999 to enable 'Hot Parking' to operate on the land. The letter was signed by one Yeo Ban Ann ('Yeo'), the vice-president and head of the plaintiff's general services department. The plaintiff alleged that the lettter dated 16 August 1999 was a forged document. However, the defendant argued that on 18 August 1999 she had paid cash of RM12,000 to Yeo who then handed to her the letter dated 16 August 1999 which the defendant contends is the contract document. The plaintiff filed this suit claiming an injunction requiring the defendant and/or her agents forthwith to vacate the land and to deliver up vacant possession.

Held:

(1) Where there is a dispute as to whether there is a tenancy at all, the injunctive orders sought by the plaintiff would in effect be giving a final judgment, even without a trial where evidence would be led. The alleged forged letter was also not sent for analysis by a hand writing expert to show that it was not signed by Yeo as the plaintiff did not have the original (see p 776F–H). Further, there are positive averments by the defendant that it was Yeo who collected the RM12,000, who promised to issue a receipt, and who handed to her the letter granting the lease and tenancy together with the keys to the gate. Yeo himself did not affirm any

affidavit let alone the affidavit in support of this application to deny under oath the allegations made by the defendant (see p 776H–I). A

(2) What the plaintiff is seeking is a mandatory injunction. Whilst the court has a discretion to grant an interlocutory mandatory injunction before trial, the discretion must be exercised only in exceptional and extremely rare cases. The case must be unusually strong and clear in that the court must feel assured that a similar injunction would probably be granted at the trial and that therefore it is just and equitable that the plaintiff's interest be protected by the immediate issue of an injunction; *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192 followed. The court is not prepared, based on the meagre evidence, to grant the order. It is only proper that the status quo of the parties be maintained until the full disposal of the suit (see p 777B–D). B C

[Bahasa Malaysia summary D

Plaintif adalah dan telah pada setiap masa matan merupakan pemilik berdaftar tanah-tanah yang terletak di Jalan Tun Perak, Kuala Lumpur, dan dipegang di bawah Geran No 38426 ('tanah tersebut'). Plaintif telah mendakwa bahawa seorang wakil suatu 'Hot Parking' telah mendekati plaintif satu masa sebelum bulan Ogos 1999 meminta kebenaran untuk menggunakan tanah tersebut sebagai satu tempat letak kereta. Permintaan tersebut telah dibuat melalui sepucuk surat bertarikh 14 Ogos 1999. Bagaimanapun, plaintif tidak mempunyai niat untuk memajak tanah tersebut untuk digunakan sebagai satu tempat letak kereta. Pada 21 Ogos 1999, plaintif menerima sepucuk surat daripada peguamcara-peguamcara 'Hot Parking' yang merujuk kepada suatu perjanjian antara 'Hot Parking' dan plaintif dan memberitahu plaintif bahawa jika terdapat apa-apa gangguan daripada plaintif menghalang tanah tersebut digunakan oleh 'Hot Parking' maka 'Hot Parking' akan memulakan tindakan mahkamah. Bersama dengan surat tersebut, peguamcara-peguamcara tersebut telah melampirkan sepucuk surat bertarikh 16 Ogos 1999 yang didakwa adalah daripada plaintif kepada 'Hot Parking', bersetuju untuk memajakkan tanah tersebut untuk tempoh tujuh tahun pada kadar RM6,000 sebulan bermula pada 18 Ogos 1999 bagi membolehkan 'Hot Parking' memulakan operasi atas tanah tersebut. Surat tersebut telah ditandatangani oleh seorang bernama Yeo Ban Ann ('Yeo'), timbalan presiden dan ketua kepada bahagian perkhidmatan awam plaintif. Plaintif telah mendakwa bahawa surat bertarikh 16 Ogos 1999 tersebut adalah dokumen palsu. Bagaimanapun, defendan menghujahkan bahawa pada 18 Ogos 1999 beliau telah membayar wang tunai sebanyak RM12,000 kepada Yeo yang kemudiannya telah menyerahkan kepada beliau surat bertarikh 16 Ogos 1999 di mana defendan menegaskan adalah dokumen kontrak tersebut. Plaintif telah memfailkan guaman ini menuntut satu E F G H I

injunksi yang menghendaki defendan dan/atau ejen-ejen beliau dengan serta-merta mengosongkan tanah tersebut dan menyerahkan milikan kosong tersebut.

Diputuskan:

(1) Di mana tiada pertikaian tentang sama ada terdapat apa-apa sewaan, perintah-perintah injunksi yang dipohon oleh plaintif akan berkuatkuasa sebagai memberi satu penghakiman muktamad, walaupun tanpa satu perbicaraan di mana keterangan dikemukakan. Surat palsu yang didakwa tersebut juga tidak dihantar untuk analisa oleh seorang pakar tulisan untuk menunjukkan bahawa ia tidak ditandatangani oleh Yeo kerana plaintif tidak mempunyai yang asal (lihat ms 776F–H). Tambahan pula, terdapat penegasan yang positif oleh defendan bahawa adalah Yeo yang menerima RM12,000 tersebut, yang telah berjanji untuk mengeluarkan satu resit, dan yang menyerahkan kepada beliau surat membenarkan pajakan dan sewaan bersama dengan kunci pagar tersebut. Yeo sendiri tidak mengesahkan apa-apa afidavit apa lagi afidavit sokongan permohonan ini untuk menyangkal secara bersumpah dakwaan-dakwaan yang dibuat oleh defendan (lihat ms 776H–I).

(2) Apa yang plaintif pohon adalah satu injunksi mandatori. Di mana mahkamah mempunyai budi bicara untuk memberikan satu injunksi interlokutari madatori sebelum perbicaraan, budi bicara tersebut hendaklah digunakan hanya di dalam kes-kes luar biasa dan yang jarang sekali berlaku. Kes tersebut hendaklah teramat kukuh dan jelas di mana mahkamah sepatutnya berasa terjamin bahawa satu injunksi yang serupa mungkin akan diberikan di perbicaraan dan oleh demikian adalah adil dan ekuiti bahawa kepentingan plaintif dilindungi oleh keluaran segera suatu injunksi; *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192 diikut. Mahkamah tidak bersedia, berdasarkan keterangan yang tak seberapa untuk memberikan perintah tersebut. Sememangnya, adalah betul bahawa status quo pihak-pihak dikekalkan sehingga penyelesaian penuh guaman tersebut (lihat ms 777B–D).]

Notes

For cases on interlocutory mandatory injunction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) at paras 2223–2232.

Cases referred to

Lee Ah Low v Cheong Lep Keen & Anor [1970] 1 MLJ 7 (refd)

Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd [1987] 2 MLJ 192 (folld)

Ajit Kumar (*Chooi & Co*) for the plaintiff. A
PM Mahalingam (*PM Mahalingam & Co*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

B

Facts

The plaintiff is and has been at all material times the registered owner of lands described as Lots 7, 12, 13, 14, 110, 113, 114, 212 and 122, Section 6, Jalan Tun Perak, Kuala Lumpur, and held under Geran No 38426 ('the land'). The land is a vacant plot upon which the plaintiff C plans to construct a building.

Plaintiff's case

It is the plaintiff's case that a representative of one 'Hot Parking' D approached the plaintiff some time before August 1999 seeking permission to use the land as a car park. The request was made by way of a letter dated 14 August 1999. The numerous approaches by the same party were rebuffed by the plaintiff which maintained that it had no intention to lease the land to be used as a car park. On 21 August 1999, the plaintiff received a letter from the solicitors of 'Hot Parking' referring to an agreement E between 'Hot Parking' and the plaintiff and notifying the plaintiff that if there was any interference from the plaintiff preventing the use of the land by 'Hot Parking' the latter would proceed with court action. Together with the said letter the said solicitors annexed a letter dated 16 August 1999 alleged to be from the plaintiff to 'Hot Parking', agreeing to lease the land for a period of seven years at RM6,000 per month commencing from F 18 August 1999 to enable 'Hot Parking' to operate a car park only on the land. The said letter was signed by one Yeo Ban Ann (Yeo), the vice-president and head of the plaintiff's general services department. There was also a copy of a police report lodged by the present defendant annexed to the said letter dated 21 August 1999. In the said report, the defendant had G complained that whilst she had paid RM12,000 (RM6,000 as deposit and RM6,000 as rental) to the said Yeo of the plaintiff, the plaintiff's representatives had chased her and her workers off the land when she went to the land on 21 August 1999 to clean it up, before commencing her parking business. In the course of the proceedings, counsel for the plaintiff conceded that the defendant and 'Hot Parking' were one and the same and H that no issue was being taken in respect of this.

The plaintiff lodged a counter police report through the said Yeo, contending that the letter purported to have been signed by him dated 16 August 1999 was a forged document. He also denied receiving the said sum of RM12,000. The plaintiff's solicitors also replied by their letter dated I 23 August 1999, the defendant's solicitors' letter dated 21 August 1999 virtually reiterating the contents of the police report.

The plaintiff's claim

The plaintiff thereafter filed this suit claiming an injunction requiring the defendant and/or her agents forthwith to vacate the land and to deliver up vacant possession, and for a further injunction to restrain the defendant and/or her agents from re-entering and re-taking the land. There was also a claim for damages for trespass.

The ex parte application

The plaintiff then took out an application ('encl 4') for the injunctive reliefs prayed for in the writ and for damages to be assessed. On 11 September 1999, I heard the ex parte application. I directed that encl 4 be served on the defendant so that the matter could be heard inter partes. However at the request of the plaintiff, I made an ex parte order that the defendant be restrained from tarring the surface of the land until further order.

Case for the defendant

The defendant averred in her affidavit in reply that before 14 August 1999 she and one Alex met with the said Yeo, who advised the said Alex to prepare a letter requesting for the lease of the land. It was upon such advice that she sent the letter dated 14 August 1999. She was then requested by the said Yeo to see him on 18 August 1999 with the sum of RM12,000. On 18 August 1999 before noon, she met the said Yeo at the tenth floor of the plaintiff's premises. The said Yeo agreed to rent/lease the land to 'Hot Parking' upon the terms and conditions as set out in the letter dated 16 August 1999 which was signed by the said Yeo. She then handed Yeo a crossed cheque for RM12,000. Yeo then returned the said cheque and sought cash of RM12,000 being RM6,000 as rental and RM6,000 as deposit. She then returned to the plaintiff's premises at about 3pm and paid cash RM12,000 to Yeo who promised to forward the receipt. Yeo then handed to her the letter dated 16 August 1999 which the defendant now contends is the contract document, together with a plan of the land and two keys to the locks to the gate of the fence surrounding the land. On 21 August 1999, her independent contractors had cleaned the land and filled the pot holes with small stones and sand and commenced the business of a car park, being in lawful possession of the land. She therefore prayed for the said application to be dismissed with costs.

Findings of the court

The inter partes application

On 17 September 1999 when the inter partes application came up for hearing, parties by consent sought an adjournment and also by consent agreed to two further orders, namely:

(1) That the defendant undertakes to protect all property of the plaintiff on the land and also undertakes to indemnify the plaintiff for all loss or damage to the same and the land.

(2) That the plaintiff and/or its agents shall be entitled to come onto the land without let or hindrance in order to inspect, survey and photograph the land and all property of the plaintiff on the land without notice.

I granted these two orders and also gave a holding over order in respect of the order made at the ex parte stage.

On 24 September 1999 when the matter came up for the inter partes hearing, the parties again by consent sought an adjournment and by consent sought a further order that the defendant was to operate the car park until the court decided on the inter parties hearing of encl 4. I granted the order sought and also gave a holding over order in respect of the order made on 17 September 1999.

On 5 October 1999, encl 4 was finally heard. Mr Ajit Kumar for the plaintiff painstakingly took me through the factual matrix of the case, as narrated by me earlier. I then asked him two questions which I thought were relevant to enable me to decide, if I should or should not grant the injunction sought.

My first question was, since the purported letter referred to a lease of seven years and that any lease beyond three years had to be registered and endorsed on the title whether this issue was raised in the affidavit. Mr Ajit very candidly admitted that it was not. I then enquired whether the Court could not then at least for the purposes of this application assume the existence of a lease for three years. I was then referred to the Federal Court decision in *Lee Ah Low v Cheong Lep Keen & Anor* [1970] 1 MLJ 7. To my mind, this case is of no assistance to the plaintiff. Firstly, it relates to a case where the tenant had validly entered into possession for a term of 80 years and had been paying a monthly rental. The agreement was not by deed nor was it registered. The respondents who bought the land gave the appellant notice to quit. The Federal Court held the lease as void but agreed with the trial judge who *found on the evidence* (emphasis provided) that the tenancy was a monthly tenancy which had been terminated by a valid notice to quit. Clearly, therefore where there is a dispute as in this case whether there is a tenancy at all, the injunctive orders sought by the plaintiff would in effect be giving a final judgment, even without a trial where evidence would be led.

The next question I asked counsel was whether the plaintiff had sent the alleged forged letter for analysis by a hand writing expert to show that it was not signed by Yeo, the vice-president of the plaintiff. Mr Ajit readily conceded that this was not done because the plaintiff did not have the original. He also agreed that no request had been made for the production of the original.

On the other hand, there are positive averments by the defendant that it was Yeo who collected the RM12,000, who promised to issue a receipt, and who handed to her the letter granting the lease and tenancy together with the keys to the gate. What to me is most significant is that Yeo himself did not affirm any affidavit let alone the affidavit in support of this application to deny under oath the allegations made by the defendant. Mr Ajit then submitted that the plaintiff was in fact going ahead with the

construction of the building upon the land. When asked if there was any evidence to this effect he merely referred me to an exh A-8 annexed to the affidavit in support of encl 4. But this is a letter dated 8 September 1999 from someone not properly identified, and referring to starter bars and prefound columns protruding above ground level and stating they could have been damaged or cut off by the car park operator. Firstly there is no positive assertion that the starter bars and prefound columns have been damaged or cut off. There is also no evidence that it had been done, if at all, by the defendant.

What the plaintiff is seeking is a mandatory injunction. In *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192 the then Supreme Court held that whilst the court has a discretion to grant an interlocutory mandatory injunction before trial, the discretion must be exercised only in exceptional and extremely rare cases. The case must be unusually strong and clear in that the court must feel assured that a similar injunction would probably be granted at the trial and that therefore it is just and equitable that the plaintiff's interest be protected by the immediate issue of an injunction. I am not prepared, based on the meagre evidence before me, to grant this order. It is only proper that the status quo of the parties be maintained until the full disposal of the suit. I therefore dismissed encl 4 with costs and also ordered the defendant not to tar the land until the hearing and disposal of this suit. Further, by consent it was also ordered that the plaintiff or its agents or servants be allowed to enter the premises to conduct pre-construction works.

Order accordingly.

Reported by Benjamin Yong